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No. 88-1548

In the Supreme Court of the United States

OCTOBER TERM, 1988

THOMAS E. BATES, PETITIONER

v.

TENNESSEE VALLEY AUTHORITY
AND ORVIS ENGELSTAD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a plaintiff who brings suit under 42 U.S.C. 2000e-16(c) against the wrong federal defendants may amend his complaint to name the correct defendant when no defendant had notice of the suit before the applicable limitations period had expired.

2. Whether the Tennessee Valley Authority may be sued under 42 U.S.C. 2000e-16(c) in its corporate name.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A6-A12) is reported at 851 F.2d 1366. The opinion of the district court (Pet. App. A13-A21) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1988. A petition for rehearing was denied on December 21, 1988. The petition for a writ of certiorari was filed on March 20, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner contends (Pet. 9-24) that the courts below misapplied Fed. R. Civ. P. 15(c) in holding that he could

not amend a complaint alleging discrimination by his employer, the Tennessee Valley Authority (TVA), to add a new party after the limitations period had expired. Petitioner adds (Pet. 24-27) that, even if he cannot amend his complaint, suit against the TVA in its corporate capacity is proper.

1. Petitioner is a white, male employee of TVA in Muscle Shoals, Alabama, who holds an Agricultural Aide, SE-4, position in one of TVA's greenhouses. In 1983, TVA reclassified petitioner's black coworker to a higher paying position in settlement of an internal Equal Employment Opportunity (EEO) complaint. Petitioner, because he was not also reclassified, filed a timely administrative complaint alleging that he was the victim of reverse race discrimination in violation of Section 717 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16. Pet. 4; Gov't C.A. Br. 2-3. Petitioner pursued his adminis rative remedies through TVA's internal procedures and the statutory review procedures of the Equal Employment Opportunity Commission (EEOC). On April 17, 1987, the EEOC issued its final determination, rejecting petitioner's claim. Pet. 4-5; Fine Aff. para 2. Petitioner received the decision on April 22, 1987. Pet. 5.

Attached to the EEOC decision, petitioner received a "Notice of Right to File a Civil Action," which advised him, "You have the right to file a civil action in the appropriate United States District Court WITHIN THIRTY (30) DAYS from the date that you receive this decision." Fine Aff. Exh. 1 (emphasis in original). The notice also recited:

> You are further notified that if you file a civil action, YOU MUST NAME THE APPROPRIATE OF FICIAL AGENCY OR DEPARTMENT HEAD AS THE DEFENDANT. Rule 25(d)(2) of the Federal

> Rules of Civil Procedure provides that you may describe the defendant by official title rather than by name. Failure to provide the NAME OR OFFICIAL TITLE of the agency head or, where appropriate, the department head, may result in the loss of any judicial redress to which you may be entitled. (Please note: For this purpose, Department means the overall national organization, such as the now defunct Department of Health, Education and Welfare, *not* the local administrative department where you might work.) You must be sure that the proper defendant is named when you file your civil action.

Ibid. (emphasis in original).

Petitioner, through his present counsel, filed suit in the United States District Court for the Northern District of Alabama on May 22, 1987, the last possible day before the statutory limitations period ran. Pet. App. A14. Petitioner's complaint named as defendants TVA and Orvis P. Engelstad, director of the local administrative division where petitioner worked, rather than the three members of the TVA Board of Directors, who are TVA's head by statute. See 16 U.S.C. 831a (1982 & Supp. IV 1986). Service of process was not mailed to the named defendants until May 29, 1987, and was not received until June 2. Pet. App. A14. Service of process directed to the United States Attorney was not issued until August 13, 1987, and was not served on the United States Attorney until August 17, 1987, 11 days after TVA had filed a motion to dismiss. *Ibid.*

The district court dismissed petitioner's complaint with prejudice. The court held that petitioner had failed to bring suit against the proper defendant within the 30-day statutory period for commencing suit because, in the orginal complaint, he had named as defendants the agency

and the division director rather than TVA's Board of Directors. Pet. App. A15-A16. See 42 U.S.C. 2000e-16(c). The court then concluded that an amended complaint naming a proper defendant could not, under Rule 15(c) of the Federal Rules of Civil Procedure, relate back to petitioner's initial complaint because petitioner had not given sufficient notice to any proper defendant within the applicable time period. Pet. App. A17-A19.

The court of appeals affirmed. Pet. App. A6-A12. It ruled first that "[n]either TVA nor Engelstad * * * fit the statutory requirement that the civil action be against 'the head of the department, agency, or unit.' " Pet. App. A8 (quoting 42 U.S.C. 2000e-16(c)). The court then addressed petitioner's attempt to amend the complaint, noting that:

> [t]he four prerequisite[s] to a "relation back" amendment under rule 15(c) are:
>
> (1) the basic claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and (4) the second and third requirements must have been fulfilled within the prescribed limitations period.

Pet. App. A10 (citing *Schiavone* v. *Fortune*, 477 U.S. 21, 29 (1986)). The court concluded that petitioner had satisfied neither the second nor the fourth of the *Schiavone* requirements.

ARGUMENT

A. The court of appeals' decision is compelled by the plain language of Rule 15(c) and by this Court's holding in *Schiavone* v. *Fortune*, 477 U.S. 21 (1986). And as peti-

tioner concedes (Pet. 23 n.15), the lower court's disposition of this case is consistent with the decision of every court to address the same issue since *Schiavone*. Further review is therefore not warranted.

1. Under Rule 15(c), an amendment changing a party against whom a claim is asserted relates back to the filing of the original complaint only if:

> *within the period provided by law for commencing the action* against the party to be brought in by amendment that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Fed. R. Civ. P. 15(c) (emphasis added). Here, the TVA Board members, who were to be brought in by petitioner's proposed amendment, did not receive notice of the initiation of the action "within the period provided by law for commencing the action against the party"—that is, within the 30-day period prescribed by Title VII for commencing suits against a federal employer. Neither did the original defendants, their lawyers, the United States Attorney, nor anyone connected with the defense receive notice. The lower courts therefore properly rejected petitioner's claim that his proposed amended complaint should have related back to the original filing date.

2. This Court has confirmed that the construction of Rule 15(c) adopted by the district court and the court of appeals is correct. In *Schiavone* v. *Fortune*, *supra*, as in this case, the plaintiff named the wrong party as the defendant and then attempted to amend his complaint to name the proper defendant. And, similarly to this case, the party the plaintiff did name was an internal division (Fortune) of the proper defendant (Time, Incorporated).

This Court determined that the plain language of Rule 15, by allowing amendments only when the party to be added had notice "within the period provided by law for commencing the action," in fact allowed amendment only when that party had notice "within the applicable limitations period." *Schiavone*, 477 U.S. at 30-31 (quoting Fed. R. Civ. P. 15 advisory committee note (1966 Amendment)). As the Court emphasized, "[t]he linchpin [for permitting "relation back"] is notice, and notice within the limitations period." *Schiavone*, 477 U.S. at 31.

In this case, as in *Schiavone*, no defendant received notice of suit until after the limitations period had expired. The lower courts therefore properly dismissed petitioner's action.

3. Petitioner nevertheless argues (Pet. 14-20) that the requirements of Rule 15(c) as stated by this Court in *Schiavone* do not apply to cases involving the federal government. In those cases, he contends that notice must be considered adequate for purposes of Rule 15(c) if the complaint is served upon the United States Attorney or another official named in the last paragraph of the rule within the 120 days specified in Rule 4(j) for timely service.

Contrary to petitioner's contention, this Court indicated in *Schiavone* that its holding requiring notice within the relevant limitations period is applicable to cases involving the federal government. The Court explained that its ruling responded to the concerns that were raised about suits against the government by Professor Clark Byse and were noted by the advisory committee when it drafted the 1966 amendment of Rule 15. *Schiavone*, 477 U.S. at 32 n.8; see Fed. R. Civ. P. 15 advisory committee note (1966 Amendment) (citing Byse, "*Suing the 'Wrong' Defendant in Judicial Review of Federal Administrative Action: Proposals for Reform*," 77 Harv. L. Rev. 40 (1963-1964)). In each of the four federal district court decisions criticized

by Professor Byse and cited by petitioner here (see Pet. 15-16), amendment of a complaint had been disallowed despite the fact that "the Government within the period of limitations was on notice of the claim." *Schiavone*, 477 U.S. at 32 n.8. The drafters of Rule 15(c) sought to reverse that result; the Court's indication in *Schiavone* that amendment would be allowed in precisely such circumstances is consistent with the reform they intended. *Ibid.* The Court's conclusion that Rule 15(c) measures timeliness with reference to the filing rather than the service of complaints under Rule 4(j) (see *Schiavone*, 477 U.S. at 30) thus applies with full force here.

The history of the 1966 amendments supports the Court's conclusion.

The drafters amended Rule 15(c) in two respects. First, they "amplified" Rule 15(c) to provide a "general solution" to the "relation back" problem as it affected both private party litigation and claims brought against the government: an amendment would relate back if it arose out of the conduct originally pleaded and "if, within the applicable limitations period, the party brought in by amendment, * * * received * * * notice of the institution of the action."[1] Fed. R. Civ. P. 15 advisory committee note (1966 Amendment).

Second, the drafters provided that "specifically in government cases," the notice requirement would be satisfied "when the government has been notified in the manner [described in Fed. R. Civ. P. 4(d)(4) and (5)]," which allow service of summons and complaint to a U.S. attorney, the Attorney General, or another designated or properly named official. Fed. R. Civ. P. 15 advisory committee note (1966 Amendment); Fed. R. Civ. P. 15(c).

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[1] Fed. R. Civ. P. 15(c) also requires that the party to be brought in "knew or should have known that, but for a mistake concerning the

Thus, the latter amendment to Rule 15(c) provides persons suing the government with a means to protect themselves against the consequences of naming the wrong federal defendant. They may deliver or mail process to "the United States Attorney, or the United States Attorney's designee, or the Attorney General of the United States" (Fed. R. Civ. P. 15(c)), and then amend the complaint later to name the proper federal defendant. But as the previous sentence of Rule 15(c) indicates, this safety net comes into play only when the plaintiff has served the United States Attorney (or other appropriate official) within the limitations period.[2] See *Schiavone*, 477 U.S. at 32 n.8; *Cooper* v. *United States Postal Service*, 740 F.2d 714, 717 (9th Cir. 1984), cert. denied, 471 U.S. 1022 (1985).

Given the plain language of Rule 15(c) and the explicit intent of its drafters, it is not surprising that every court of appeals to address the question since *Schiavone* has determined that a Title VII complaint must be dismissed when it names the wrong federal defendant and when the plaintiff failed to serve any federal official or agency within the statutory limitations period.[3] This Court has repeatedly declined to review the issue presented here (see *Cooper*, *supra*; *Gonzales* v. *Secretary of the Air Force*, 824 F.2d 392 (5th Cir. 1987), cert. denied, 108 S. Ct. 1245 (1988)), and there is nothing that would warrant a departure from that result in this case.

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identity of the proper party, the action would have been brought against the party."

[2] See Fed. R. Civ. P. 15(c) advisory committee note (1966 Amendment) (emphasis added) (in the four district court cases giving rise to the 1966 amendment, "the government was put on notice of the claim *within* the stated period – in the particular instances, by means of the initial delivery of process to a responsible government official").

[3] See, *e.g.*, *Johnson* v. *United States Postal Service*, 861 F.2d 1475 (10th Cir. 1988); *Honeycutt* v. *Long*, 861 F.2d 1346 (5th Cir. 1988);

To the contrary, the conclusion that petitioner should be held to compliance with Rule 15(c) requirements applies with special force here. Not only did petitioner fail to take advantage of the safety mechanism provided by the last paragraph of Rule 15(c), but he failed to heed the emphatic warning each Title VII litigant has received since January 1987 with his EEOC right-to-sue letter. That letter cautioned him, "if you file a civil action, YOU MUST NAME THE APPROPRIATE OFFICIAL AGENCY OR DEPARTMENT HEAD AS THE DEFENDANT. * * * Failure to provide the NAME OR OFFICIAL TITLE of the agency head or, where appropriate, the department head, may result in the loss of any judicial redress to which you may be entitled." Fine Aff. Exh. 1 (emphasis in original). Throughout this case, petitioner has been represented by counsel; there is no reason to excuse his

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Brown v. *Department of Army*, 854 F.2d 77 (5th Cir. 1988); *Lamb* v. *United States Postal Service*, 852 F.2d 845 (5th Cir. 1988); *Harris* v. *United States Department of Transp.*, 843 F.2d 219 (5th Cir. 1988); *Williams* v. *Army & Air Force Exch. Service*, 830 F.2d 27 (3d Cir. 1987); *Bell* v. *Veterans Admin. Hosp.*, 826 F.2d 357 (5th Cir. 1987); *Gonzales* v. *Secretary of the Air Force*, 824 F.2d 392 (5th Cir. 1987), cert. denied, 108 S. Ct. 1245 (1988); *Koucky* v. *Department of the Navy*, 820 F.2d 300 (9th Cir. 1987); *Hymen* v. *Merit Sys. Protection Bd.*, 799 F.2d 1421 (9th Cir. 1986), cert. denied, 481 U.S. 1019 (1987).

The cases cited by petitioner (Pet. 23-24) for contrary results are inapposite. *Mondy* v. *Secretary of the Army*, 845 F.2d 1051 (D.C. Cir. 1988), involved equitable tolling of the limitations period. In *Rice* v. *Hamilton Air Force Base Commissary*, 720 F.2d 1081 (9th Cir. 1983), which was decided before *Schiavone*, the court found that the papers constituting a plaintiff's complaint, if not the caption of the complaint, sufficiently identified the proper defendant. The court in *Cupp* v. *Veterans Admin. Hosp.*, 677 F. Supp. 1018 (N.D. Cal. 1987), followed *Rice* and thus did not reach the Rule 15(c) question. See 677 F. Supp. at 1021 n.2.

lack of compliance with the procedure for filing this complaint.[4]

B. Petitioner's contention (Pet. 24-27) that TVA is, in any case, subject to suit under 42 U.S.C. 2000e-16(c) as a corporate entity contradicts the plain language of 42 U.S.C. 2000e-16(c).[5] That Section provides that a claimant "may file a civil action * * * in which * * * *the head* of the department, agency, or unit, as appropriate, shall be the defendant." 42 U.S.C. 2000e-16(c) (emphasis added). The words "department, agency, or unit" are defined in 42 U.S.C. 2000e-16(a), which states that the Section applies to:

> All personnel actions * * * in military *departments* as defined in section 102 of title 5, in executive *agencies* as defined in section 105 of title 5 * * * and in those *units* of the legislative and judicial branches of the Federal Government having positions in the competitive service * * *.

42 U.S.C. 2000e-16(a) (emphasis added). Section 105 of Title 5 in turn declares that an Executive agency includes "a Government corporation," which is further defined as "a corporation owned or controlled by the Government of the United States." 5 U.S.C. 105, 103.

TVA is indisputably such an entity. *E.g., Dodd* v. *Tennessee Valley Authority*, 770 F.2d 1038, 1040 (Fed. Cir. 1985); *Jackson* v. *Tennessee Valley Authority*, 595 F.2d 1120, 1121 (6th Cir. 1979), aff'g and adopting 462 F.

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[4] See also *Baldwin County Welcome Center* v. *Brown*, 466 U.S. 147, 152 (1984) (ruling that in Title VII suits, as in other actions, "strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law").

[5] Petitioner did not raise this issue in the district court or in the court of appeals until after it had issued its ruling. See Appellant's C.A. Br. and Arg. in Support of Application for Reh'g 3-6. The courts below thus did not rule on the issue.

Supp. 45, 50 (M.D. Tenn. 1978); *Painter* v. *Tennessee Valley Authority*, 476 F.2d 943, 944 (5th Cir. 1973). Thus, a Title VII suit can be brought only against the "head" of TVA, its three-member Board of Directors. See *Ballard* v. *Tennessee Valley Authority*, 768 F.2d 756, 764 n.23 (6th Cir. 1985); *Horton* v. *Tennessee Valley Authority*, No. 79-W-5028 (N.D. Ala. May 19, 1980), slip op. 3 (unpublished opinion); *Brickley* v. *Tennessee Valley Authority*, No. 77-M-0580 (N.D. Ala. Oct. 11, 1977), slip op. 2 (same); *Bell* v. *Tennessee Valley Authority*, No. CA 77-P-0240-NE (N.D. Ala. June 21, 1977), slip op. 3 (same).[6]

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[6] The lower courts' conclusion concerning suits against the TVA conforms with the settled and consistent rulings that only the head of an employing federal agency, not the agency itself, is subject to suit under Section 2000e-16(c). See, *e.g.*, note 4, *infra* (citing cases); *McGuinness* v. *United States Postal Service*, 744 F.2d 1318, 1322-1323 (7th Cir. 1984); *Cooper* v. *United States Postal Service*, 740 F.2d 714, 715-716 (9th Cir. 1984), cert. denied, 471 U.S. 1022 (1985); *Canino* v. *EEOC*, 707 F.2d 468, 472 (11th Cir. 1983); *Newbold* v. *United States Postal Service*, 614 F.2d 46 (5th Cir.), cert. denied, 449 U.S. 878 (1980). And, as is true in cases involving the United States Postal Service, the specific directive in Title VII that only the head of an employing agency can be named as the defendant in a Title VII suit is not affected by the fact that the TVA as a corporate entity can "sue and be sued" in general litigation. The cases cited by petitioner (Pet. 27) are thus not relevant. See *Peoples National Bank of Huntsville* v. *Meredith*, 812 F.2d 682 (11th Cir. 1987) (suit arising out of TVA's development and administration of loan program); *Painter* v. *Tennessee Valley Authority*, 476 F.2d 943 (5th Cir. 1973) (wrongful death action against TVA); *Algernon Blair Industrial Contractors, Inc.* v. *Tennessee Valley Authority*, 552 F. Supp. 972 (M.D. Ala. 1982) (action against TVA under Contracts Disputes Act of 1978, 41 U.S.C. 601 *et seq.*); *Carborundum Co.* v. *Tennessee Valley Authority*, 521 F. Supp. 590 (E.D. Tenn. 1981) (suit against TVA concerning lawfulness of minimum electric service charge provision of power contract).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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